UNITED STATES
v.
GRANCER D. JENKINS

IBLA 72-480 Decided May 21, 1973

Appeal from a decision by Administrative Law Judge 1/ Dent D. Dalby canceling the appellant's desert land entry, I 016298.

Affirmed.

Administrative Practice--Administrative Procedure: Generally--Attorneys--Constitutional Law--Contests and Protests: Generally--Desert Land Entry: Cancellation--Rules of Practice: Government Contests

> Although a contestee in a desert land entry contest brought by the United States has the right to be represented by and aided by legal counsel, he has no right under the Constitution or the Administrative Procedure Act to have the Government provide such counsel for him.

Desert Land Entry: Cultivation and Reclamation--Desert Land Entry: Final Proof

> Satisfactory final proof of the reclamation, irrigation and cultivation of land in a desert land entry must show that the entryman has made a bona fide effort to produce remunerative agricultural crops. The raising of a crop without irrigation is not evidence of reclamation of the land.

Desert Land Entry: Cultivation and Reclamation--Desert Land Entry: Final Proof

> A desert land entryman may be entitled to a patent on those subdivisions of the entry on which he has installed an irrigation system capable of irrigating the entire subdivision.

1/ The change of title from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to the order of Civil Service Commission, 37 F.R. 16787.

Desert Land Entry: Distribution System--Desert Land Entry: Final Proof

> Final proof for a desert land entry is properly rejected where it is established that the entryman has not constructed all of the permanent main and lateral canals, or other means to conduct water necessary for the irrigation of all of the irrigable land in the entry.

APPEARANCES: Grancer D. Jenkins, pro se; Riley C. Nichols, Esq., Boise Field Solicitor's Office, Department of the Interior, for the United States.

OPINION BY MR. RITVO

Grancer D. Jenkins has appealed to the Secretary of the Interior from an Administrative Law Judge's decision dated May 20, 1972, canceling his desert-land entry Idaho 016298 for failure to comply with the requirements of the desert land law, 43 U.S.C. §§ 321 et seq. (1972). Appellant contends that he substantially complied with the requirements of the desert land entry law and that the hearing was unfair since he was unable to obtain legal counsel. Finding the appellant's contentions to be without merit, we affirm the decision of the Administrative Law Judge.

The Facts

Jenkins submitted his desert land entry application to the Bureau of Land Management on April 4, 1965. The area included four 40-acre subdivisions totaling 160 acres located in E 1/2 NW 1/4 and W 1/2 NE 1/4 sec. 7, T. 9 S., R. 22 E., B.M., Idaho. The lands were described as arid and unfit for crop production without irrigation. Jenkins' plan for irrigating the land was to drill a well in the center of the entry and employ a sprinkler system. He also stated that the land could be reclaimed by ditch irrigation but that he planned to use a sprinkler system. In order to implement his irrigation plans, Jenkins applied to the State of Idaho for a permit to appropriate subterranean waters. Upon receipt of Jenkins' water permit application, the Bureau of Land Management approved Jenkins' entry on February 8, 1966. Jenkins filed annual proofs with the Bureau of Land Management and on April 16, 1970, final proof was submitted.

The Bureau of Land Management instituted a contest by filing a complaint charging:

> (a) An irrigation system sufficient for the proper irrigation of all the irrigable lands in the entry

had not been installed at the expiration of the statutory life of the entry on February 8, 1970.

(b) The entry has not been developed substantially in accordance with the plans filed with the application for desert land entry.

The Hearing

The hearing on the contest complaint was held in Burley, Idaho, on December 1, 1971, before Judge Dent D. Dalby. At the outset Jenkins requested a delay on the grounds that he had no counsel and was financially unable to obtain one. Judge Dalby denied Jenkins' request for a continuance since the regulations require any such request to be filed not less than ten days before the hearing. 43 CFR 4.452-3. Consequently, Jenkins acted as his own counsel.

The Bureau of Land Management first called to the stand, Donald Runberg, the Bureau of Land Management realty specialist for the Shoshone District Office. Runberg examined Jenkins' entry on April 10, 1970, one week before final proof, and again on November 26, 1971. (Tr. 15-16). During his testimony, Runberg used several maps and pictures, which were entered into evidence, to explain and describe his findings when visiting the entry. In the center of the 160 acres Runberg found a well with a pump and motor attached. The irrigation system consisted of water being pumped into an irrigation ditch which meandered north and south of the well. Gravity was then employed to irrigate the cultivated land east of the ditch. Runberg found no evidence of any portable sprinkler system on his April 1970 examination. (Tr. 23.) The total acreage which could be irrigated in April 1970 was determined to be 26 acres. Runberg estimated the total tillable acreage on the entry to be 140 acres. (Tr. 32.)

The 26 acres which had been cultivated in 1969 were east of the irrigation ditch and included three acres in the NE 1/4 NW 1/4, less than one acre in the SE 1/4 NW 1/4, nine acres in the SW 1/4 NE 1/4, and 14 acres in the NW 1/4 NE 1/4. (Tr. 31-32.) Therefore, Runberg's testimony substantiated the fact that Jenkins satisfied the statutory requirement that one-eighth of the land be cultivated. 43 U.S.C. § 328 (1970). Departmental regulations further require that the one-eighth portion which is cultivated also be irrigated in a manner calculated to produce profitable results. 43 CFR 2521.6(f). This regulation also has been satisfied according to Runberg's testimony.

Jenkins failed, however, to satisfy the mandate of the regulation which requires that an irrigation system capable of irrigating all of the tillable land in the entry be installed at date of final proof. 43 CFR 2521.6(f). The regulation provides:

> The final proof must clearly show that all of the permanent main and lateral ditches, canals, conduits, and other means to conduct water necessary for the irrigation of all the irrigable land in the entry have been constructed so that water can be actually applied to the land as soon as it is ready for cultivation. If pumping be relied upon as the means of irrigation, the plant installed for that purpose must be of sufficient capacity to render available enough water for all the irrigable land. If there are any high points or any portions of the land which for any reason it is not practicable to irrigate, the nature, extent, and situation of such areas in each legal subdivision must be fully stated. If less than one-eighth of a smallest legal subdivision is practically susceptible of irrigation from claimant's source of water supply and no portion thereof is used as a necessary part of his irrigation scheme, such subdivision must be relinquished. (43 L.D. 269.)

The only irrigation system Jenkins had at the date of his final proof was a gravity flow employing a ditch which followed the contour of the land north and south of the well.

After being questioned under direct examination by the government, Jenkins took the stand in his own behalf. He testified that a well was drilled on the entry in 1968. (Tr. 69.) The cost was $12 a foot and the drilling went 515 feet before striking water. The total cost incurred by Jenkins was $6,180, a portion of which is still owed to the driller. (Tr. 96.) On January 21, 1969, Jenkins purchased a pump at the cost of over $5,000 and a motor for $1,850. (C-2.)

Prior to the installation of his well, Jenkins testified that in 1967 he cultivated and sowed a crop of mixed grain in the NE 1/4 NW 1/4 and the SE 1/4 NW 1/4. No ditches were constructed, however, and no attempt was made to irrigate or harvest the crop. (Tr. 70-71.) Existence of the 1967 grain crop is confirmed by the depositions of Jenkins' neighbors Frank and Eva Bell. Their statements were submitted after the hearing on January 19, 1972. Both testified that Jenkins' sowed a grain crop in 1967 in the land west of the well site. They also remembered Jenkins drilling his well in 1968 and not planting during that year.

In 1969 Jenkins cultivated and irrigated a potato crop in the area east of his new well. This was in the 26 acres previously described by Runberg. The crop was successful although portions were damaged by an infestation of jackrabbits. Jenkins sold the crop to the Simplot Company, and after the expenses were deducted, he received a check for $275. (Tr. 71-73.) The Simplot records have slightly varied figures and indicate Jenkins received a payment of $217.75. The statutory life of Jenkins' desert land entry expired on February 7, 1970. Jenkins allegedly planted grain during the 1970 season and irrigated this crop by sprinkler. The cultivated area included the land put to potatoes in 1969 and additional land in the SE 1/4 NW 1/4 and the SW 1/4 NE 1/4. (Tr. 82.) Jenkins could not produce any evidence of this grain crop since he did not keep his receipts separate from the grain crop harvested from his patented lands. Furthermore, Jenkins alleged in his brief that he used a rented sprinkler system in 1971 which provided water to the entire 160 acres.

Citing statutory language and Departmental decisions, Judge Dalby found that Jenkins failed to meet the reclamation and cultivation requirements prior to the expiration of his entry in February 1970. He concluded that the entryman had not constructed an irrigation system during the life of the entry capable of irrigating any legal subdivision. He also concluded that the entryman had failed to reclaim and cultivate the land "substantially in accordance with the plan herein provided for * * *," that is by the sprinkler system, described in his application, that the Bureau would not have approved a gravity flow system and that, as a result, the entryman had not complied with the requirements of law.

The Appeal

The appellant filed a statement of reasons asking this Board to reverse Judge Dalby's decision on grounds of unfairness at the hearing and his compliance with the desert land entry laws both before and after the expiration date of his entry. First, Jenkins protests being compelled to continue the hearing absent the assistance of legal counsel on his part. This argument is without merit since the appellant had more than adequate notice of the hearing and could have filed a timely notice for a continuance. 43 CFR 4.452-3. Due process requirements are satisfied by proper notice and an opportunity for a hearing. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 338 (1963); United States v. Sullivan, 9 IBLA 278 (1973); United States v. Haas, A-30654 (February 16, 1967). While appellant has the right to be represented by legal counsel, he has no right to have counsel provided nor is the Department obligated by the Constitution or the statute or otherwise to furnish

counsel for a party to an administrative hearing. Hullom v. Burrows, 266 F.2d 547, (6th Cir. 1959), cert. denied, 361 U.S. 919 (1959); United States v. Fenton, A-30621 (January 9, 1967).

Accepting the validity of the proceedings before Judge Dalby, we shall now consider Jenkins' contentions of compliance with the desert land entry laws. It was undisputed at the hearing that the only area cultivated, irrigated and harvested was the 26 acres of potatoes in 1969. (Tr. 32, 71-73.) The acres planted in grain in 1967 without any irrigation are inapposite in determining whether the entrant reclaimed the land. The raising of a crop without irrigation is not evidence of reclamation; only lands which are planted and irrigated with a prospect of a remunerative crop evidence a good faith effort on the entrant's part toward reclamation. United States v. Knowlton, A-30912 (May 21, 1968); Charles Edmund Bemis, 48 L.D. 605 (1922); Instructions, 4 L.D. 51 (1885). His appeal heavily relies on planting and irrigating activities subsequent to the expiration date of his entry in February 1970. The activities of the appellant after expiration of his entry likewise cannot be considered in determining if the statutory requirements have been satisfied. The statutory prerequisite for issuance of a patent is reclamation within four years (43 U.S.C. § 329 (1970)), and the regulations clearly state:

> (a) The entryman, his assigns, or, in case of death, his heirs or devisees, are allowed 4 years from date of entry within which to comply with the requirements of the law as to reclamation and cultivation of the land * * *.
>
> (1) Where the proof establishes that the entryman cannot effect timely compliance with the law, the entry must be canceled unless statutory authority permits the granting of an extension of time or other relief.

43 CFR 2521.6(a) and (1).

Therefore the appellant's right to a patent must be tested against his performance during the statutory life of the entry. At the expiration date, there was no sprinkler system at all on the land. The development of a well capable of producing enough water for the operation of a sprinkler system is not enough, in the absence of the means of delivering the water to the entry. United States v. Mauldin, A-30466 (January 6, 1966). Accordingly, the well by itself does not satisfy the requirement of the law.

The gravity system of irrigation supplied water to about 26 acres. As we have seen it was so constructed that it traversed each 40 acre subdivision and irrigated some acreage in each, although quite minor areas in the two westerly subdivisions. The Government witness testified that topography of the rest of the land in the entry made a sprinkler system the only feasible method of irrigation (Tr. 32), but he agreed that the ditch could be extended so that more land in the SW 1/4 NE 1/4 could be irrigated by gravity under the present system. (Tr. 39.) He said, however, that he saw no evidence of any such extension. He also agreed that the contours were such that water could be brought by ditch to the SE 1/4 NW 1/4 and with some excavation to the NE 1/4 NW 1/4. (Tr. 46-48.) He maintained, however, that he had seen no evidence of any ditch other than the one he had first described. (Tr. 49.)

In summary then, appellant asserts that 70 acres of the 160 have been and are irrigable by a gravity system (Tr. 47), but the United States witness steadfastly maintained that the ditch on the entry was capable of irrigating only the 26 acres he described. (Tr. 49-50, 56-58.) He also stated that it was the Bureau's policy to allow a desert land entry for all of a legal subdivision so long as five acres of it was susceptible to cultivation. (Tr. 55.) Jenkins agreed that in 1969, the year the well was drilled, he had not irrigated to the west of the ditch. (Tr. 101.)

Jenkins contends that he has met the requirements of the law and regulation by bringing water to each legal subdivision and cultivating by irrigation 1/8 of the entry. The United States admits this much, but contends that the proof is insufficient because it does not demonstrate that the gravity flow system can irrigate all the irrigable land in each subdivision.

The pertinent regulation, supra, plainly requires as a prerequisite for patent that main and lateral ditches, or other means to conduct water, have been constructed so that water necessary for the irrigation of all irrigable land in the entry have been constructed. The evidence plainly demonstrates that the entryman has not met this requirement. Therefore, for this reason alone, the final proof was properly rejected and the entry canceled.

We need not, then, consider whether the entry was also subject to cancellation because the entryman's method of irrigation differed from the one he apparently described in his application.

Since Jenkins did not file for an extension of time in filing final proof, the final proof he did file failed to meet the requirements of reclamation and must be rejected.

The final possibility of relief for appellant would be if he adequately reclaimed any one of the four 40-acre subdivisions. An entryman may be entitled to the subdivisions in which the proposed irrigation system actually reclaimed the land. United States v. Swallow, 74 I.D. 1 (1967); United States v. Maudlin, supra. None of Jenkins' four subdivisions, however, had an irrigation system installed at the date of final proof which could provide water to all of the irrigable land in the subdivision. In light of these facts, Jenkins is not entitled to receive a patent on any of the 40-acre subdivisions.

Because appellant has not demonstrated substantial compliance with the mandatory requirements, equitable adjudication will not lie. We are not, however, blind to the special circumstances which this case presents involving physical hardships, personal tragedy, and the loss of a very substantial financial investment through the appellant's sincere effort to reclaim the land. Appellant alleges that he was seriously injured when a horse he was riding reared and fell over backwards on him. He states that he suffered from a painful physical ailment, and that while working with a machine a bit of metal was imbedded in his eye, so damaging the optic system that extensive surgery was required. Appellant has unquestionably invested heavily in money, time and labor in the improvement of the land through clearing brush, drilling the well, extracting and removing rock, constructing the irrigation system and cultivating the entry, all of which will be lost to him by reason of his failure to successfully meet the requirement for irrigating all the arable land within the time allowed. The eventual installation of the rented sprinkler irrigation system, although too late to be counted as compliance with the law, demonstrates the feasibility of the undertaking. Moreover, since the land is classified (apparently properly) for disposal under the desert land law, and remains open to such dispositions so long as it is unreclaimed, it is not unlikely that some other entryman could succeed him and gain the benefit of his efforts.

Accordingly, despite our inability to afford the appellant the relief he seeks, we note that he may be eligible to make a second entry pursuant to the Act of September 5, 1914, 43 U.S.C. § 182 (1970) or he may seek assistance through legislation which may be introduced on his behalf.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Judge Dalby is affirmed.

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Martin Ritvo, Member

We concur:

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Edward W. Stuebing, Member

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Joseph W. Goss, Member